IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.33 OF 1994

Sunil Jyotindr Ganguli & anr. Appellants

Vs.

The State of Maharashtra Respondent

Mr.H.H.Ponda with Mr.A.H.H.Ponda for appellants.
Mr.V.B.Konde-Deshmukh, APP for State.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

September 08, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed challenging the order of conviction and sentence recorded against the appellants-original accused nos.1 and 2 on 7/1/1994 by the Addl. Sessions Judge, Greater Bombay in Sessions Case Nos.52 and 157 both of 1982.

2. Briefly stated the prosecution case can be narrated as under:

. The incident of assault had taken place on 8/4/1981 at about 8 p.m. at Lalbaug near Jijibhoy lane when one Kalloo Kahar was assaulted with knives. The accused after assaulting the deceased ran away. Hearing the shouts of the deceased to save him members

of the public chased the accused. The persons who chased the accused also included three constables who were on patrolling duty in that area. Accused no.1 was found lying down in injured condition at some distance near Panwalla building at some distance from the place of incident. Immediately after the assault the deceased, who was accompanied by his mother and 1 & 1/2 year old daughter, took a taxi and went to KEM hospital for the purpose of treatment. Accused no.1 was also taken by the constable to the KEM hospital for the purpose of treatment. After the deceased was admitted to the KEM hospital his statement was recorded on the basis of which FIR (Exh.26) was lodged. When the accused no.1 was admitted to the KEM hospital on the same night, his statement was recorded but that has not been produced on record by the prosecution. After recording the statement of accused no.1, the deceased, who was in conscious condition, was confronted with the statement of accused no.1 on 9/4/1981. As per the statement of the deceased four unknown persons armed with open knives and chains attacked him and stabbed him on his buttocks and on his back. According to the said statement there was a dispute between the tenants and the landlord of Bhav Mary Patra Chawl at Sewree and he had taken the side

of the tenants. It seems that on the basis of the statement of accused no.1, accused no.3 was also arrested who died even before the trial took place. The TI parades were held in respect of accused nos.1 and 3 initially on 24th April 1981 but the same was not produced as the concerned SEM died. Thereafter the parade was held on 30th April 1981 in respect of accused no.1. PW 2 the police constable had identified him. On 30th April 1981 another parade was held where PW 5 had identified accused nos.1 and 3. Accused no.2 was arrested in September 1981 and thereafter TI parade was held on 28/9/1981 where PW 2 and other prosecution witnesses who had turned hostile also identified him. During the course of investigation the police had recorded the statements of the various witnesses. The injured Kalloo Kahar succumbed to his injuries in the hospital on 14/4/1981. The clothes of the deceased and the accused persons as well as the knife which was lying by the side of the injured accused no.1 were sent to CA for examination. After completion of the investigation the charge-sheet was filed and the case was committed to the Sessions Court.

3. Before the Sessions Court the charge was framed

against both the appellants i.e. original accused nos.1 and 2 for offence under section 302 of IPC read with section 34 of IPC to which both the accused pleaded not guilty. On behalf of the prosecution 11 witnesses were examined. PW 1 is Suresh Acharekar who identified the accused at the parade but had turned hostile. PW 2 is Subhash Sawant, the constable attached to Kalachowki police station who was on patrolling duty in the same area on the night of the incident. PW 3 is Prakash Sawant who is also a hostile witness. PW 4 is Tukaram Bansode who drew the plan of the place of incident. PW 5 is Kondiba Bangar, the Head Constable who was also on patrolling duty on the night of the incident. PW 6 is SEM Mahesh Mulye who conducted the test identification parades. PW 7 is Dr.Karandikar who had produced the medical record from the KEM hospital in respect of the treatment given to the deceased. PW 8 is Dr.Vaz who had produced the post-mortem report. PW 9 is Dr.Tambe who had conducted post-mortem on the dead body of the deceased. PW 10 is PSI Vithal Gidde who had initially investigated the case. The last prosecution witness is PW 11 PI Bhat who had subsequently taken over the investigation from PW 10. The defence of both the appellants is of denial.

4. After considering the entire evidence on record the trial Court by its impugned judgment and order dated 7/1/1994 convicted both the appellants for offence under section 302 read with section 34 of IPC and sentenced both of them to life imprisonment and to pay a fine of Rs.1000/- each in default to suffer further RI for one month. The said judgment and order of conviction and sentence is under challenge in this appeal preferred by the appellants.

5. We have been taken through the evidence of the prosecution witnesses by the defence Advocate. We have heard both the sides in the matter. The learned defence Advocate has contended that the only evidence on the basis of which the trial Court has convicted the appellants is their identification by the two constables who were on patrolling duty as the other witnesses who had identified the accused at the TI parade had not supported the prosecution case at the trial. He has pointed out from the evidence of the two constables that their evidence is not sufficient to base the conviction of the appellants. He also submitted that the prosecution not having produced on record the statement of the injured accused no.1 and the supplementary statement of the deceased recorded

by PSI Gidde, adverse inference should be drawn against the prosecution for not having disclosed the entire case before the Court. He has also submitted that accused no.1 having received incised wounds, the prosecution ought to have explained the injury on his person and in the absence of the explanation the prosecution case cannot be believed. The learned APP on the other hand has fairly stated that the conviction is based only on the evidence of identification of the accused by two constables who are examined as PW 2 and PW 5.

6. From the evidence of Dr.Tambe PW 9 who conducted the post mortem examination it appears that the deceased had received five external injuries which were on sup.iliac spine i.e. on the back side of the deceased. This is in consonance with the statement of the deceased which was recorded after he was admitted to the KEM hospital. The deceased was assaulted on 8th April 1981 but he died on 14th April 1981 i.e. after a period of six days. The deceased had suffered corresponding internal injuries. Because of the assault made on the deceased his kidney was damaged. As per the evidence of Dr.Tambe the injury no.5 was sufficient in the ordinary course of nature to cause

the death of a human being. Injury no.5 as mentioned in the post mortem report is as follows:

5.	IW oblique, gaping medial end 40 cm. from midline, 10 cm x 1 cm x kidney deep in 11th intercostal space in rt. renal direction forward.

He has deposed that all the injuries were ante mortem. He has further deposed that injury no.5 which had injured kidney is on the vital part of the body. He has further deposed that those injuries could be caused by any pointed sharp edged weapon such as knife or gupti but not sword. In the cross-examination, however the doctor has admitted that he had seen the pancreas and noted fatty necrosis which meant death of cells. He has further admitted that the inflammation of pancreas and stab wound were causes of death and if one of the two causes was absent, it would not have caused death. In any event he has deposed that injury no.5 was grievous injury and that injury was stab wound which was possible with a knife. In the statement of the deceased he has mentioned that he was assaulted with knives and chains.

7. The next important question to be decided is as to whether the accused were the assailants of the

deceased. In order to fix the guilt of the accused persons the prosecution has relied on the evidence of six witnesses. PWs 1 and 5 have been examined to show that they had identified the accused persons who were seen by them while running away immediately after the incident of assault on the deceased. PW 6 is the SEM who was examined by the prosecution to show that prosecution witness nos.1, 3 and 5 had identified the accused persons as the persons running away with the weapons in their hands. PW 1 Suresh Acharekar has deposed that he was standing near Masurkar Opticians i.e. the corner of Jijibhoy Lane and Ganesh Galli where the incident had taken place at the relevant time. He had heard the shouts of "bachav, bachav" but he had turned hostile and did not support the prosecution case. From his cross-examination by the P.P. it appears that he had identified the accused persons. He had also given the descriptions of accused persons in his police statement. In the cross-examination he admitted that he had identified one person in one parade and another person in another parade but he did not identify the accused persons in the Court. Similarly PW 3 Prakash Sawant had also turned hostile and did not identify the accused persons in

the Court though he had identified the accused at the parade.

8. The prosecution is then left with the evidence of two witnesses PWs 2 and 5, both of whom were constables on duty at the relevant time in the area where the incident took place. Both of them were at that time attached to Kala Chowki police station. According to PW 2 he saw three persons running away after the injured person shouted "pakdo, pakdo". According to him out of those three persons two persons had blood stained knives in their hands. He saw them running towards panwala compound. Thereafter, he went upto the second floor of panwala building for arresting them but could not locate any of the accused there. On coming down he saw one person lying down on the road with the blood stained knife lying near him. That person was none other than accused no.1. He then informed the police station and the jeep arrived at the spot and the injured was taken to the hospital in the jeep along with the blood stained knife. At the TI parade he had identified two accused in the first parade and one accused in the second parade. He identified accused nos.1 and 2 at the parade. However, it is

important to note that he had not stated that he had seen accused no.1 as the person who was running away immediately after the incident. In his cross-examination he has admitted that the culprits were not seen by him. Yet he has identified accused no.1 at the TI parade. It is also important to bear in mind that this witness was attached to Kalachowki police station. He had seen the accused no.1 as the person lying on the road and, therefore, informed the police station about the incident. That is how accused no.1 was taken to KEM hospital in the jeep. Therefore, no significance can be attached to the identification of accused no.1 by this witness at the TI parade when he himself admits that he had not seen the culprit. When the witness has seen accused no.1, there was no point in holding TI parade for the identification of accused no.1 by the said witness. Even in respect of the other accused no much significance can be attached as he was also kept at the police station before the TI parade was held.

9. The other witness PW 5 Kondiba Bangar was also at the relevant time attached to the same police

chowki and was on the patrolling duty along with the other two constables one of whom was PW 2. He had also seen accused no.1 lying near the place of incident and, therefore, no significance can be attached to his identifying the accused at the TI parade. He has identified accused no.2 as the person who was running in front of him with knife but there is no recovery of knife at the instance of accused no.2 made any time after his arrest. No doubt he was arrested much late i.e. after a period of five months in the month of September 1981. PW 5 in his cross-examination admits that it is true that he did not see the accused properly and, therefore, cannot say who they were. Thus no significance can be attached to TI parade where he is supposed to have identified the accused. Moreover he was also constable attached to the same police station and, therefore, had the opportunity to see accused no.2 earlier.

10. As regards the involvement of accused no.1 it is important to point out that as per the medical certificate (Exh.33) he had received following three injuries on his person:

(1) I.W. lat. aspect of (L) thigh
2 cm x 1 cm x ? deep.

(2) Hematoma (R) Panotid region.

(3) Fracture mandible (R) angle
into symphisis mentiro.

There was fracture of mandible on right side. He had received incised wound on his left thigh. He was lying on the road in injured condition and near him was found blood stained knife. The said knife was sent for examination of CA and as per the CA report (Exh.34) the blood group on that knife could not be determined. The said report even does not mention whether the blood noticed on the blade of knife was human. The blood stained clothes of accused no.1 were attached and sent to CA. The blood found on the clothes of accused no.1 was of "B" group. The blood of accused no.1 was of "B" group which was found on his clothes. The blood found on the clothes of the deceased was of "A" group which was not noticed on the clothes of accused no.1 and, therefore, that circumstance also was not available to the prosecution.

11. Apart from that it is significant to note that as per the evidence of PW 10 PSI Gidde, after accused no.1 was taken to the KEM hospital his statement was recorded at 9.45 p.m. on the date of the incident. Thereafter the witness had confronted the injured Kalloo Kahar, who died thereafter, with the statement of the accused no.1 and then recorded further statement of deceased Kalloo. Neither the statement of accused no.1 nor the further statement of the deceased recorded on 9/4/1981 has been produced on record by the prosecution for the reasons best known to it. The defence Advocate rightly contends, therefore, that adverse inference should be drawn for not producing the further statement of the deceased because that would have thrown light on whether accused no.1 was party to the assault on him. The prosecution is silent whether the deceased was shown accused no.1 when both of them were admitted to the same hospital. That was essential because in the statement of the deceased which was treated as FIR the deceased had stated that the accused were not known to him but he would be in a position to identify them if shown. This conduct of the prosecution creates doubt about the truthfulness of the prosecution case as regards the involvement of

the accused persons.

12. It is also relevant to point out that accused no.1 was found lying in injured condition on the road at the time of incident and near about the place of incident on the basis of which it was inferred that accused no.1 was party to the assault on the deceased. From the statement of the deceased which is treated as FIR it does not appear that the deceased was responsible for the injury caused to accused no.1 but after he was confronted with the statement of the accused no.1 further statement of the deceased which was recorded on the following day might have thrown some light whether accused no.1 had received that injury while he was assaulting the deceased. When the accused no.1 had received incised wound on his thigh which was possible with a pointed weapon like knife, duty is cast on the prosecution to explain that injury. The injuries suffered by him do not appear to be simple in which case he would not have been found lying on the road in injured condition with the blood stained knife lying near him. The incised wound received on the thigh of the accused cannot be explained by the prosecution saying that on the shouts of "bachao, bachao" raised by the

deceased, the people who had chased the accused must have caused that injury, because the members of the public were not expected to cause incised wound which could have only been caused with sharp edged weapon like knife.

13. In the aforesaid state of the evidence led by the prosecution we find that the prosecution case lies in the realm of doubt. One would only wonder how the trial Court could have observed in para 18 of the judgment that so far as accused no.1 is concerned, it was the case of an eye witness account in as much as the deceased had identified him as it was substantiated by the evidence of PSI Gidde, when there appears to be nothing in the evidence of PSI Gidde PW 10 that he had proved the identification of accused no.1 by the deceased. The witness has only stated that the deceased was confronted with the statement of accused no.1 and his further statement was recorded which was not produced on record. In the circumstances, the accused are entitled for the benefit of doubt and for acquittal.

14. In the result, the appeal is allowed and the order of conviction and sentence recorded by the

Addl. Sessions Judge, Greater Bombay in Sessions Case Nos.52 and 157 both of 1982 is quashed and set aside and both the appellants are acquitted of the offence with which they were charged. The bail bonds of the accused shall stand cancelled and they are entitled for the refund of the fine amount if already paid.

(S.S.PARKAR,J.)

(S.R. SATHE,J.)